IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

Dale L. and Judy A. Bedlington, as individuals and their marital community, Respondents, v. John Lee De Bruin and Jane Doe De Bruin; Mary Duren and John Doe Duren; and Harvey De Bruin and Jane Doe De Bruin, all in their individual capacities and marital communities, Appellants.	No. 62536-5-I (Consolidated with No. 62586-1-I) DIVISION ONE UNPUBLISHED OPINION FILED: July 20, 2009

Leach, J. — This case presents the question whether a party who has successfully submitted a will for probate may later challenge the decedent's capacity to grant a durable power of attorney on the same day she signed her will. We hold that a court may apply judicial estoppel to bar a party from challenging the decedent's capacity on the day she signed her will when that party has previously attested that the decedent was of sound mind on that day by obtaining an order admitting the will for probate. We affirm.

Factual Background

John DeBruin, Harvey DeBruin, and Mary Duren are three of four adult children of Henrietta DeBruin, who died in 2006. Dale and Judy Bedlington are potato farmers who have leased agricultural property from Henrietta DeBruin since 1994. The 1994 lease was accompanied by an option to purchase the property and was for a term of two crop years. On October 27, 1995, the Bedlingtons entered into another lease agreement with Henrietta DeBruin for a term of three years, from March 1, 1996, to February 28, 1999. The lease included the following option to purchase:

> In partial consideration of the rentals paid herein the Lessor hereby grants the Lessees the exclusive option to purchase the premises on or before February 28, 1999 on the following terms and conditions. Sale shall be by means of a long form Real Estate Contract. The option price is ONE HUNDRED TEN THOUSAND AND NO/100 ($110,000.00) DOLLARS. A minimum down payment of TWENTY TWO THOUSAND AND NO/100 ($22,000.00) DOLLARS shall be required at closing. The balance of the purchase price shall be payable in minimum annual payments due on the anniversary of closing of EIGHT THOUSAND NINE HUNDRED SIXTY FIVE ($8,965.00) DOLLARS or more per year with first such payment due one year after closing and subsequent payments due on or before the same day of each succeeding calendar year until the balance shall have been paid in full. Interest shall be chargeable as to the diminishing principal balance at eight (8%) per cent [sic] per annum until the entire balance of the contract shall be due and payable in full. If the Lessees elect to pay a down payment greater than TWENTY TWO THOUSAND AND NO/100 ($22,000.00) DOLLARS, the contract balance shall be paid in equal annual installments due on the anniversary of the closing date amortized over twenty (20) years including interest as to the diminishing balance at eight (8%) per cent [sic] per annum from closing.

The lease and option contained therein were extended by three sequential

modifications. The first two modifications were signed by Henrietta DeBruin, extending the lease and option through February 28, 2005. The third modification was signed by John DeBruin "with Power of Attorney for Henrietta M. DeBruin," and extended the lease and option through February 28, 2008. Each of the three modifications expressly extended the option to purchase. The third modification, signed by John DeBruin, provided:

> The Lessees [sic] option to purchase the property shall continue to apply as provided in Paragraph 13 of the parties [sic] original Lease Option Agreement. The option price shall continue to be the same price as specified in Paragraph 13 of the parties [sic] Lease Option Agreement and the terms of purchase shall be the same as set forth therein, provided that the last date at which the Lessees shall have a right to exercise the option shall be extended from February 28, 2005 to February 28, 2008.

The third modification increased the Bedlingtons' annual rent to $5,000, an increase of $500 per year over the original rent of $4,500 they had been paying since 1994.

The durable power of attorney that granted John DeBruin the authority to sign the lease modification on behalf of Henrietta DeBruin was executed on July 2, 2004. The document designated John DeBruin and/or Mary Duren to act individually as attorney-in-fact for Henrietta DeBruin. The powers granted the attorney-in-fact included the powers to "[s]ell, convey, exchange or otherwise transfer or encumber any real or personal property of the principal." That same day, Henrietta DeBruin signed her last will and testament, leaving her estate in

equal shares to John DeBruin, Harvey DeBruin, and Mary Duren. Mrs. DeBruin excluded her daughter Marcella Kiel from the will, stating that Marcella had already received substantial amounts from her, which she had decided to treat as an advancement of Marcella's inheritance. The will designated John DeBruin and Mary Duren as co-personal representatives of the estate.

After their mother's death, John DeBruin and Mary Duren were appointed co-personal representatives of the estate. They obtained an order admitting the will to probate, which included the declaration that "the decedent's Last Will and Testament was executed at a time when decedent was of legal age and sound mind . . . ." The order was signed by the court and by an attorney representing them and the estate. On April 30, 2006, they executed a deed conveying the property to themselves and Harvey DeBruin.

The Bedlingtons continued to possess the property and pay rent under the lease through its February 2008 expiration. On February 19, 2008, they notified John DeBruin, Harvey DeBruin, and Mary Duren that they intended to exercise their option to purchase. Appellants refused to sell them the property.

The Bedlingtons sued for specific performance in Whatcom County Superior Court. They moved for summary judgment on their claim for specific performance. In response, appellants argued that the Bedlingtons did not have an option to purchase the property because the durable power of attorney authorizing John DeBruin to sign the last modification to the lease on behalf of

Henrietta DeBruin was invalid, thus rendering invalid the lease modification he signed as attorney-in-fact. Mary Duren argued that "[a]s of July 2, 2004, Henrietta was wholly incompetent, and had no capacity to grant her power of attorney." John DeBruin and Harvey DeBruin similarly argued that their mother did not have the capacity to appoint an attorney-in-fact. Appellants submitted declarations asserting that their mother was in the advanced stages of Alzheimer's disease and would not have known what she was doing.

The Bedlingtons brought a second motion for summary judgment, asking the court to strike the affirmative defense that Henrietta DeBruin lacked capacity to execute the durable power of attorney on July 2, 2004, because the appellants had already probated her will and obtained title to the property of her estate. The Bedlingtons argued that the proffered defense was barred by collateral estoppel and/or judicial estoppel because it was inconsistent with the position appellants had taken in the probate matter.

The trial court agreed and granted summary judgment striking the affirmative defense of incapacity. The trial court also granted in part and denied in part the Bedlingtons' first summary judgment motion, ruling that John DeBruin did not make a gift of Henrietta DeBruin's property when he signed the lease option but that issues of fact remained regarding the other issues raised in that motion. Pursuant to CR 54(b), the trial court made appropriate findings and directed entry of a final judgment on the incapacity defense. John DeBruin and

Harvey DeBruin through their counsel and Mary Duren through her counsel appeal from the trial court's order striking the affirmative defense of incapacity.[1] Their appeals were consolidated by this court.

Standard of Review

We review a trial court's application of judicial estoppel for abuse of discretion.[2] The trial court's order will not be disturbed unless the exercise of discretion was manifestly unreasonable or based on untenable grounds or reasons.[3]

Discussion

"'Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking advantage by taking a clearly inconsistent position.'"[4] The purposes of judicial estoppel are "to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes; to bar as evidence statements by a party which would be

[1] Although the "Order Granting in Part and Denying in Part Plaintiffs' Motion for Summary Judgment on Claim for Specific Performance" is attached to the notice of appeal in each case, the notices each state that the order being appealed is the "Order Granting the Plaintiffs' Motion to Strike the Affirmative Defense of Helen [sic] DeBruin's Incompetency." Because the briefs only address the order striking the affirmative defense of incapacity, that is the issue we review in this appeal.

[2] Miller v. Campbell, 164 Wn.2d 529, 536, 192 P.3d 352 (2008).

[3] Miller, 164 Wn.2d at 536.

[4] Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (quoting Bartley-Williams v. Kendall, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006)).

contrary to sworn testimony the party has given in prior judicial proceedings; and to avoid inconsistency, duplicity, and the waste of time."[5]

In determining whether judicial estoppel applies, a trial court considers (1) whether a party has taken a position that is clearly inconsistent with its earlier position, (2) whether the court's acceptance of the inconsistent position "would 'create the perception that either the first or the second court was misled,'" and (3) "'whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.'"[6] These factors are not exclusive and the trial court may consider other factors in its decision.[7]

Appellants argue that under Markley v. Markley[8] the parties must be the same in both proceedings, or in privity therewith, and that the party claiming estoppel must have been misled and have changed his position because of the other party's earlier inconsistent assertion. However, citing Markley, our Supreme Court has held that "'additional considerations' may guide a court's decision,"[9] while holding that only "[t]hree core factors guide a trial court's determination" of whether to apply judicial estoppel.[10] Professor Karl B. Tegland

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[5] Seattle-First Nat. Bank v. Marshall, 31 Wn. App. 339, 343, 641 P.2d 1194 (1982).

[6] Arkison, 160 Wn.2d at 538-39 (quoting New Hampshire v. Maine, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)).

[7] Arkison, 160 Wn.2d at 539.

[8] 31 Wn.2d 605, 198 P.2d 486 (1948).

[9] Arkison, 160 Wn.2d at 539 (emphasis added).

maintains that judicial estoppel "is applicable regardless of whether a judgment on the merits was entered in the first trial. And it may be invoked by a stranger to the first suit against a party who was a party to, or a witness in, the first suit."[11] Division Three of this court approved this view in Johnson v. Si-Cor Inc.[12] There, the court held:

> We agree with Professors Orland and Tegland that because the doctrine of judicial estoppel is designed to protect courts, courts should not impose elements of related doctrines like equitable and collateral estoppel, which are intended primarily to protect litigants. We conclude that the doctrine may be applied even if the two actions involve different parties. We further conclude that the doctrine may be applied even if there is no reliance, no resultant damage, and no final judgment entered in the first action.[13]

We agree and conclude that judicial estoppel does not require that the parties be the same in both suits.

Here, appellants' later position that Henrietta DeBruin lacked the capacity to execute the durable power of attorney is clearly inconsistent with their earlier position that the will she executed on the same day "was executed at a time when decedent was of legal age and sound mind." The trial court's acceptance of that position would certainly create a perception that either the trial court in this matter or the probate court was misled.

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[10] Arkison, 160 Wn.2d at 538-39.

[11] 14A Karl B. Tegland, Washington Practice: Civil Procedure § 35.57, at 512 (2003).

[12] 107 Wn. App. 902, 28 P.3d 832 (2001).

[13] Johnson, 107 Wn. App. at 907-08 (citing 14 Lewis H. Orland & Karl B. Tegland, Washington Practice: Trial Practice § 382 (5th ed.1996)).

Appellants argue that they did not intend to obtain an advantage by asserting the earlier position that Henrietta DeBruin had the capacity to execute her will. They claim that the possibility of her incapacity simply never crossed their minds. However, the appellants' intent is irrelevant if, in fact, they would "'derive an unfair advantage or impose an unfair detriment'" by asserting the inconsistent position.[14] The appellants benefited from their initial position that Henrietta DeBruin was competent when her will was admitted to probate because they received a larger share of the estate than if they had taken under the law of intestacy, which would have allotted one-fourth of the estate to their sister, Marcella. If they were now allowed to argue that their mother was wholly incompetent, they would prevent the Bedlingtons from exercising the option to purchase in addition to reaping the benefits of their earlier inconsistent position. This is an unfair advantage to appellants and an unfair detriment to the Bedlingtons. The trial court did not abuse its discretion in applying judicial estoppel to bar the defense that Henrietta DeBruin lacked the mental capacity to execute the durable power of attorney.

Finally, Harvey DeBruin argues that judicial estoppel cannot be asserted against him because he was not a party to the probate action. But it has long been the law of our state that heirs, legatees, and devisees are bound by the

[14] Arkison, 160 Wn.2d 538-39 (quoting New Hampshire v. Maine, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)).

judgment in a probate action as if they had been named parties in the proceeding.[15] "[O]ne who accepts a benefit under a will must accept the whole will and ratify every portion of it."[16] Harvey DeBruin did not contest the will, he accepted benefits under it, and he is now bound by the probate court's determination that his mother was competent when she executed it.

Because we affirm the trial court's application of judicial estoppel, we do not address whether collateral estoppel applies.

Affirmed.

Leach, J.

WE CONCUR:

Cox, J.

Becker, J.

[15] Litzell v. Hart, 96 Wash. 471, 477, 165 P. 393 (1917).
[16] Parkes v. Burkhart, 101 Wash. 659, 664, 172 P. 908 (1918).